APPENDIX

A. Excerpts from United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005)

B. Memorandum from Edward Reich, Director, Stationary Source Compliance Division, EPA, to Directors, Air & Waste Management Divisions, EPA Regional Offices (1983)

C. Excerpts from Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Jan. 29, 2002)

D. Excerpts from Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Oct. 7, 2002)

E. Excerpts from Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky. Sept. 7, 2005)

Appendix A

Excerpts from United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005):

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Nevertheless, the panel in a footnote concluded that the PSD regulations could be interpreted to adopt an hourly rate test as in NSPS. Slip op. at 15 n.7. The panel did not explain how its position could be reconciled with the regulatory text, though it noted that the district court had attempted to do so and described that court's reasoning.[6] Id. at 10, 15 n.7. That reasoning was, however, inconsistent with the regulatory language. The district court largely ignored the applicable part of the PSD regulations and reached its conclusion based on a misreading of an inapplicable part, known as the "increased hours" exclusion. 278 F. Supp. 2d at 640-41. Under that exclusion, "[a] physical change or change in the method of operation shall not include" an "increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2), (iii) (1987). Based on a misunderstanding of that provision, the court thought the regulations could be read to say that an emissions increase traceable to increased hours of operations cannot trigger the PSD provisions. * * * *

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[6] The panel also noted that "EPA's Director of the Division of Stationary Source Enforcement twice opined" that the PSD regulations could be interpreted to adopt an hourly rate test, slip op. at 16 n.7, but the documents in question – two letters written by an inferior EPA official in 1981 – contained no analysis of the regulatory language and in fact were inconsistent with that language. App. 234-35, 242-43.

Appendix B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR, NOISE, AND RADIATION

MEMORANDUM

SUBJECT: Applicability Determination Summaries

FROM: Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Directors, Air & Waste Management Divisions
Regions II-IV, VI-VIII, X

Directors, Air Management Divisions
Regions I, V, IX

Attached is a summary of all PSD determinations of applicability made by this office between May 1, 1983 and September 30, 1983. Please take note of the determinations and assure that affected agencies in your Region are aware of them as well.

You should also be aware that, as explained in my September 15, 1983 memorandum, budget cuts directed by the Comptroller's Office have eliminated SSCD's applicability determination function. Thus, this will constitute our final summary of applicability determinations.

s/

Edward E. Reich

Attachment

cc: Peter Wyckoff
Sara Schneeberg
Mike Trutna
PSD Contacts

Appendix C

Excerpts from Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Jan. 29, 2002):

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* * * *

BY MR. BRUBAKER:

Q. Mr. Trutna, I hand you what's been marked as Exhibit OE 194. Have you seen this document before, Mr. Trutna?

A. Not to my recollection.

Q. Are you familiar with a coal conversion

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project that occurred at the Bridgeport Harbor Unit 3 generating unit in Bridgeport, Connecticut, during your tenure as chief of the new source review section?

A. I'm looking. I see I'm a cc, so I probably got a copy of this document. I cannot recall any involvement in it immediately, anyway.

Q. You may or may not have had involvement, you just don't recall presently?

A. I certainly don't recall presently. There's a chance reading this might refresh my memory.

Q. Okay. And you see it's signed by Edward Reich?

A. Yes.

Q. And he is the top air enforcement person who was making PSD applicability determinations at this time; is that right?
A. I believe he was the ranking official that made applicability determinations, yes.
* * * *

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Q. And this determination bears a date of July 28, 1983. That would be a determination, then, made under the 1980 PSD rules, would it not?
A. And, apparently, the NSPS rules as well.
Q. And this was a determination made at the time you were chief of the new source review section?
A. Yes. * * * *

Appendix D

Excerpts from Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Oct. 7, 2002):

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* * * *

Q. Mr. Van Mersbergen, I'd like to show you OE 553. This is a memorandum from February 13, 1978, from a Mr. Ed Reich. Do you recognize the name Ed Reich?
A. I do.

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* * * *

Q. Do you know the position Ed Reich had in the EPA in 1978?
A. Okay. According to this memo, at that time he was director of the stationary source enforcement division.
Q. The division of stationary source enforcement in Washington?
A. That's correct.
Q. And you understand that to be the headquarters enforcement office?
A. Yes.
Q. I think it might have gone through some slight name changes from time to time, but there was a headquarters enforcement office that Ed Reich was the leader of?
A. That's correct. * * * *

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* * * *

Q. Do you recall the headquarters enforcement office taking primacy with respect to all PSD applicability determinations in this time frame?

A. Yes. They made the applicability

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determinations in the earlier years.

Q. So it was centralized in Washington within the enforcement group in Washington; is that right?

A. That's correct.

Q. Did they keep records of the PSD applicability determinations they made –

MR. MACLAUGHLIN: Objection.

Q. – the headquarters enforcement office that is?

MR. MACLAUGHLIN: Objection; foundation; speculation.

You may answer.

A. I am aware of determinations that they have cataloged and sent out, but I am in no position to say whether or not everything they did they kept record of.

Q. Uh-huh.

A. So I – the answer is I don't know whether they kept record.

Q. But you are aware of a catalog that was kept by the headquarters enforcement office of PSD applicability determinations?

A. That's correct.

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Q. And did you receive that catalog in the course of your work as the NSR person in Region 5?
A. I did.

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Thereupon, OE Exhibit 554 is marked for purposes of identification.

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Q. Let me ask you to look at OE 554, Mr. Van Mersbergen. This is a January 9, 1980 memo from Ed Reich to a number of addressees that attaches a summary of applicability determinations prepared by his office and then there appears an organized numbering system of determinations. Do you recognize this as the kind of compilation of PSD applicability determinations you received in this 1980 time frame?

MR. MACLAUGHLIN: Objection; foundation.

You may answer.

A. I recognize these determinations having received – having received these kinds of determinations for applicability determinations they made in Washington.

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* * * *

Q. Now, would these PSD applicability determinations from Mr. Reich qualify as determinations or guidance within the meaning of this Paragraph 3 of the Ohio EPA PSD delegation letter?

A. Certainly, within the scope of the PSD regulations that were at that time – that were at that time. There was a regulation change in 1980, and it might not be certain that after the delegation that all these particular pieces of – all these policy statements were applicable to another set of regulations that was substantially different than the earlier set.
Q. Do you know if the headquarters enforcement office continued in its centralized function of making PSD applicability

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determinations after 1980?
A. There was sometime when that program pulled back and the responsibilities shifted – the lead – there was a time when those responsibilities begin to emerge into the office of general counsel shared with enforcement and OAQPS. There's some time there it was sort of worked out that this group would be now making these determinations or – and then they would divide up that which would be technical, that which would be essentially legal.
Q. So the centralized monopoly, if you will, of the headquarters enforcement office to make these determinations was disseminated among several different offices within EPA at some point in time?
A. It was disseminated and then as regions matured, some of these determinations were then further delegated to the regions with the intent to incorporate input from the headquarters office.
Q. Do you recall when the transition from

centralized determinations to decentralized or more decentralized determinations in the NSR program occurred?

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A. It wasn't –

MR. MACLAUGHLIN: Objection; ambiguous. You may answer.

A. Yeah, right. It wasn't a specific date. It was – it was a fluid thing. And as I said, there was some regions that had more competence; and then there were some regions that even with competence felt pretty dependent on headquarters. And then there were some regions that loved the – what they considered autonomy. So it was a mixed bag. So I can't say what time. It just occurred gradually. And to an extent, all right? Even upon the time I left, we felt pretty dependent upon getting headquarters' input if nothing more than to make sure that we had national consistency.

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Q. Mr. Van Mersbergen, I've shown you OE 555. This is a set of documents that's been produced in discovery by the United States in this case, and it appears to be an update of the compilation in this case of NSPS applicability determinations from the headquarters enforcement office. If I could just call your attention to the page that has the Bates stamp 2285 on it.

That's about ten pages into this document. It's a February 4, 1983 memo from Ed Reich.
A. Okay, yes. Yes, okay.
Q. And this is the same Ed Reich who is the head of headquarters enforcement, is it not?

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A. Yes, it is.
Q. And then you'll see behind that letter is an organized numbered system of NSPS applicability determinations?
A. Let me see if I can identify that as NSPS. I don't see anything specifying that.
Q. Go back to the page we were just looking at, the memo from Mr. Reich.
A. Yes.
Q. It's a composite summary of all NSPS determinations of applicability made by Mr. Reich's office through December 31, 1982.
A. Okay. I concur that your observation is correct.
Q. Are these the kind of determinations that you in your job in Region 5 would receive a copy of and use in your job?
A. That's right. This was one of the series, and we would distribute these to the states. * * * *

Appendix E

Excerpts from Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky. Sept. 7, 2005):

[page 6]

* * * *

Q. You're currently with the Environmental Protection Agency; is that correct?
A. Yes, I am.
Q. What is your current position?
A. I'm director of the waste management division in EPA Region 4's regional office here in Atlanta, Georgia.
* * * *

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* * * *

Q. And am I correct that you began with Region 4 EPA here in Atlanta sometime in 1974?
A. Yes.
Q. And from 1974 until that date you gave, 2002, were you in the air program in Region 4 the entire time?
A. Different parts of it, yes.
* * * *

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* * * *

Q. Can you approximate when it was that you became branch chief?
A. Well, the date can be determined precisely. I think it was around the end of 1978.
Q. And of what branch did you become chief at that time?
A. It was called either the air programs or air planning branch.
Q. Did you hold that position until you became division director in 1985?
A. No.
Q. What jobs or positions did you have in the interim?
A. There was a reorganization of the region, and I don't remember the date, and all of the air

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branches were consolidated into a branch, and I was the deputy branch chief.
A. And you don't recall the approximate year that that occurred?
A. Early '80s. No, I don't recall the approximate year, the exact year, I mean.
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* * * *

Q. (By Mr. Long) Mr. Smith, do you recognize what Exhibit 230 represents?

A. Yes.
Q. What is it, sir?
A. It's a memorandum talking about commencing construction under PSD.
Q. Is this an example of guidance that the regions would get on the air programs which you referred to earlier?
A. Yes.

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Q. Is it from the director of the division of stationary source enforcement; do you see that?
A. Yes.
Q. And it was sent, I take it, to all the regions; is that correct?
A. I can't confirm that. Certainly sent to Region 4. The CC lists a lot of names. I can't confirm that was the current list of division directors at that time or they were in all the regions.
Q. Was it part of the regular operating procedures at that time for guidance to be circulated to all the regions?
A. Yes.
Q. And the purpose of that was to ensure the uniform interpretation and application of the rules; is that correct?
A. One of the purposes, yes.
Q. Okay. Other purposes you can think of?
A. Information sharing.
Q. What was the division of stationary source enforcement at the time, to your understanding?
A. The division of stationary source enforcement was a division in headquarters. And

headquarters normally develops the guidance and

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implementation procedures for these programs, and this part of PSD was their responsibility.
Q. When you say, this part of PSD was their responsibility, what exactly do you mean?
A. I'm not sure I can define that exactly. There are other divisions in office of air quality plannings and standards in North Carolina that had responsibility like modeling and things like that, but certain – certain decisions were made by certain divisions in terms of implementation, guidance. And commence construction was under obviously what we refer to as DSSE. * * * *